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IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

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Luigi Sagliuzzo, et al.,
Libellants and Appellants,
vs.
Gasoline Launch "I. S. E. #2,"
Respondent,
J. E. Frymier,
Respondent and Appellant.

APPELLANTS' BRIEF ON APPEAL.

LOUCKS & PHISTER,
C. W. PENDLETON,
Proctors for Appellants.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

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APPELLANTS' BRIEF ON APPEAL.

This is an action by the members of the crew of the gasoline launch "I. S. E. 2" to recover wages earned by them between the first (1st) and twenty-sixth (26th) days of January, 1926. The employment was upon lays and the total amount earned by them during that time and which amount was unpaid was the sum of one thousand five hundred ($1,500.00) dollars.

This is an appeal from the judgment dismissing the libel after exceptions were sustained to both the original libel and the first amended libel, the libellants having declined to amend.

There were eight (8) exceptions to the original libel and fifteen (15) to the first amended libel. The ma-

jority of them are technical exceptions not going to the merits of the action. Exceptions 3, 4, 5, and 6 to the original libel [Tr. p. 10], and Exceptions 8 and 9, to the amended libel [Tr. pp. 19 and 20], go to the merits of the action and will therefore be treated by us first.

The exceptions above enumerated make the point that the court sitting in admiralty has no jurisdiction of a suit by fishermen working on lays or shares until an accounting has been had with the owner and the amount due to the members of the crew determined. The court below decided that since an admiralty court does not have jurisdiction of a suit for an accounting as it had no jurisdiction in this action unless the libellants could allege and prove that an exact balance had been determined to be due each of the libellants herein, as their share of the catch or catches made by the vessel and crew.

This contention has been answered adversely to the contention of the respondent every time it has arisen. The true rule of law is that a court of admiralty has no jurisdiction over a suit asking for an accounting. However, if an action is brought over which the admiralty court has jurisdiction because of the maritime nature thereof, jurisdiction is not lost by reason of the necessity of an accounting being had for the purpose of determining the exact amount the libellants may be entitled to recover. In other words, the court of admiralty having jurisdiction of the subject matter retains jurisdiction for all purposes necessary for a determination of the issues involved even though questions which are not maritime

in their nature may incidentally arise during the progress of the litigation.

The precise question involved here has, however, been answered directly. Benedict on Admiralty (Fifth Edition), volume I, section 81, says:

> "In the earliest periods of maritime commerce, a common form of compensating the mariner was by giving him, in one way or another, an interest in the success of the voyage. In modern times, fixed pecuniary wages have taken the place of a share of the earnings, except in the cases of whaling, fishing, and sealing voyages, in which the ancient mode of compensation still prevails. In England, before her Acts restoring the admiralty jurisdiction, none but contracts in the usual form were allowed to be prosecuted in the admiralty and a fixed rate of pecuniary wages was held to be the usual form. There cannot be a more striking illustration of the caprice and want of rational principle which characterizes the prohibitions of the English common law courts. Where a fishing vessel is worked on the quarter lay plan, her crew have a lien, as for wages, upon the vessel and catch on board, for their share of the catch."

In the case of:

> The Hunter, 47 Fed. 744,

which was decided by a District Court of California in 1886, the court went into a detailed accounting of a whaling voyage to determine what amount was actually due to the libellant in that case, who was a member of the crew of the vessel and who alleged that he had not been properly paid his share of the proceeds received

from the sale of oil and bone at the end of a whaling voyage.

In the case of:

> The Barbara Hernster, 146 Fed. 732 (C. C. A., 9th Cir., 1906),

the court went into detailed accountings to determine the exact amount owing to libellants who were members of the crew of the whaling vessels.

We believe that the foregoing authorities have completely set at rest the contention made by the respondent in this case as to the jurisdiction of the court in admiralty.

Exception No. I.

Exception No. 1 to the original libel is as follows:

"That it cannot be ascertained therefrom with what master or with what owners said purported contract alleged in paragraph #4 thereof was made or whether the said master or the said owners had an interest therein by way of lay or otherwise, or whether the said purported master is one of the libellants." [Tr. p. 9.]

The libel alleges that the contract was made by the libellants with the master and owners. As there can be but one master, under the law, of any vessel, at any one time, and as such master, by the provisions of the Act of 1920, represents all of the owners, whoever they may be, there is nothing indefinite about paragraph #4 of the libel. As this is an action for seamen's wages, it certainly is not necessary for them to allege what interest the master or owners had in the cargo or its proceeds. Until the contrary is made to appear, the owner of the vessel is presumed to be the owner of the cargo. Whatever interest they may have had or what share they

were to receive is a matter of defense to be set up by them.

Exception No. II.

The second exception is as follows:

"That it cannot be ascertained therefrom by whom said fish referred to in paragraph #5 thereof were sold or what sum was obtained therefor." [Tr. p. 9.]

A complete answer to this exception seems to be contained in paragraph #5 of the original libel [Tr. p. 4]. The libel says:

"That during said time the said libellants and respondent vessel caught said fish which were sold by the master or owners of said vessel for a sum in excess of one thousand five hundred ($1,500.00) dollars."

This is a direct allegation that the master sold the fish and since he, by law, represents the owners, he must have acted for them. The sum obtained therefor is peculiarly within the knowledge of the owners and not the members of the crew, who are mere laborers and know nothing of the business of the vessel.

Exception No. V.

Exception No. 5 is as follows:

"That it does not appear therefrom that each or any of said libellants had a commercial fishing license as required by the laws of California." [Tr. p. 10.]

It is a sufficient answer to this contention to say that there is no law of the state of California or of the United States which requires a seaman fisherman to have a commercial fishing license as a condition precedent to his receiving wages as such seaman fisherman.

Exception No. VI.

Exception No. 6 is as follows:

"That it cannot be ascertained therefrom what amount if any is or might become due or payable to any of said libellants thereunder." [Tr. p. 10.]

We assume that the respondent means to raise by this exception the question of whether or not it is necessary that the exact amount which may be due each libellant be set forth separately, either in one cause of action or in several causes of action.

Sections 45-47, Revised Statutes of: 9 Fed. St. Ann. 168, provides that seamen who are members of the crew of the same vessel may join in a suit against her for wages due them. This was even the law long prior to the passage of sections 45-47, Revised Statutes. In the case of:

> Oliver v. Alexander, 31 U. S. (6 Pet.) 43, 8 L. Ed. 349,

was a case in which a number of seamen joined in a suit against a vessel, claiming wages due them for a voyage, alleging generally the total amount due to all of them and praying judgment that the libellants might recover the sum total due as wages. The court below in entering its judgment gave a separate judgment to each libellant for the amount of wages due to him. No individual libellant recovered more than nine hundred ($900.00) dollars.

The question involved in this appeal was whether or not the Supreme Court had appellate jurisdiction, since the amount involved in each particular claim was less than two thousand ($2,000.00) dollars. The sum total involved was greatly in excess of that amount.

The Supreme Court had, in a previous appeal on behalf of the seamen, considered the appeal and reversed the judgment of the lower court without in any manner touching upon the question of its appellate jurisdiction in this particular case.

The Supreme Court neither approved nor disapproved the pleading, which was apparently substantially in the same form as used herein, but held that the decree must be several as to each seaman. It further held that since on the former appeal it had before it only the libel which prayed for the total amount no question could have been raised therein as to its appellate jurisdiction.

In the case of:

Pratt v. Thomas, 19 Fed. Cas. No. 11377,

the exact point raised here was passed upon. The court says:

> "Another cause of exception is, 'that there is no proper account or exhibit of the pretended demand or claim for wages'. * * * It is sufficient if the libellant states the contract and avers the service with proper certainty and that there is a balance of wages remaining due. It is not, that I am aware, absolutely necessary that he should allege any precise balance to be due."

In other words, the amount for which the fish were sold, the amount of fish actually caught and the share due to each member of the crew are facts which are peculiarly within the knowledge of the owner of the vessel and not in any wise within the knowledge of the fisherman, who is a mere laborer on the vessel. Certainly it cannot be reasonably required of the libellants that

they allege facts in their libel which are not at all within their knowledge.

Exception No. VII.

Exception No. 7 is as follows:

"That it cannot be ascertained therefrom where or whereby said launch 'I. S. E. 2' is libel *in rem* for any amount."

Exception No. VIII.

And Exception No. 8:

"That it cannot be ascertained therefrom wherein or whereby the said J. E. Frymier is liable *in personam* in any amount." [Tr. p. 10.]

These two exceptions are taken together by reason of the fact that they are both answered in the case of:

The Carrier Dove, 97 Fed. 111 (C. C. A.),

where the court decides that in a case where fishermen have hired a vessel on the quarter lays they are not charterers but seamen, and are all entitled to libel the vessel *in rem* for their share. The court also says that under ordinary circumstances they could hold the owner *in personam*. However, in that case it was pleaded and proved on behalf of the owner that the master was in fact owner *pro haec vice,* and that all of the libellants knew the facts concerning the master's authority and that they therefore could not recover under those facts *in personam* against the owner, but were relegated to their action *in rem* against the vessel and to an action *in personam* against the master.

AMENDED LIBEL.

The amended libel becomes somewhat uncertain because of the libellants' attempt in their amended libel to overcome some of the objections made to the original libel. All of the exceptions, however, are essentially the same as the ones made to the original libel and may be answered by the same argument.

Exception No. I.

Exception No. 1 to the amended libel is the same as Exception No. 5 to the original libel and has been heretofore answered.

Exception No. II.

Exception No. 2 [Tr. p. 18] covers the same ground as Exception No. 6 to the original libel and has been heretofore answered.

Exception No. III.

Exception No. 3 is as follows:

"That it cannot be ascertained therefrom whether said agreement alleged in paragraph #4 was in writing or oral." [Tr. p. 19.]

This is completely answered by the fact that it is immaterial whether the agreement is in writing. It is further answered by the fact that an allegation that an agreement was made is an allegation that it was made in writing.

Exception No. V.

Exception No. 5 to the amended libel [Tr. p. 19] is as follows:

"That it cannot be ascertained whether the said alleged master made the agreement referred to in paragraph #5 of said libel on his own behalf and responsibility, or on behalf of said vessel, or by what authority the same was made."

The Act of 1920 makes the master presumably agent for the vessel and owner. If he therefore makes a contract, it is presumed, in the absence of contrary showing, that he did it as agent for the owners and for the vessel.

Exceptions Nos. VII to XIV.

Exception No. 7 [Tr. p. 19] to the amended libel, and Exceptions No. 8 and No. 9, go to the merit of this action and have been heretofore answered.

Exception No. 10 [Tr. p. 20] to the amended libel is the same as Exception No. 7 to the original libel and has been heretofore answered.

Exception No. 11 to the amended libel is the same as Exception No. 8 to the original libel and has been heretofore answered.

Exceptions Nos. 12 and 13 to the amended libel [Tr. p. 20] are not material to this appeal since the libellant, Vincent Mascola, is not an appellant.

Exception No. 14 to the amended libel [Tr. p. 20] is the same as Exception No. 6 to the original libel and has been heretofore answered.

Exception No. XV.

Exception No. 15 is as follows:

"That said amended libel is not duly verified as to said separate claims." [Tr. p. 20.]

The verification of the libel is to be found on page #6 of the transcript and a verification of the amended libel on page #17 of this transcript. Since the libellants are unquestionably permitted to join in a libel against the vessel, it is certainly only necessary for the libel to be verified once. Any one of several plaintiffs in a common law or equity action or of several libellants or respondents in an action in admiralty may certainly verify on behalf of all.

We therefore respectfully submit that the court below should have overruled the exceptions, both to the original libel and the amended libel.

Respectfully submitted,

LOUCKS & PHISTER,
C. W. PENDLETON,
Proctors for Appellants.